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FILED

March 10 2010

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Ed Smith  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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Robert James Thomas DOC# 2067081  
Alternatives, Inc. Alpha House  
3109 1<sup>st</sup> Ave N.  
Billings, MT 59101  
PRO SE PETITIONER

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. OP 10-0113

ROBERT JAMES THOMAS  
Petitioner,

vs.

MIKE FERRITER, Director of Montana  
Department of Corrections; and

DAVE ARMSTRONG, Director of  
Alternatives, Inc.; Alpha Pre-Release.  
Respondents.

VERIFIED PETITION FOR  
WRIT OF HABEAS CORPUS

COMES NOW, pro se petitioner Robert Thomas, and declare I am currently unlawfully restrained of my liberty at Alpha House Pre-Release located at 3109 1<sup>st</sup> Ave N. in Billings, Montana 59101.

I respectfully petition this Honorable Court for a Writ of Habeas Corpus pursuant to the provisions of Article II, Section 19 of the 1972 Montana Constitution and §46-22-101, MCA, et. seq. and in support thereof, I present the following:

SUMMARY OF RELIEF REQUESTED

Petitioner is being held pursuant to a final judgment entered May 19<sup>th</sup> 2006 by Montana Fourth Judicial District Court, Missoula County District Court Judge John W. Larson under Cause No. DC-04-083 for the violation of §45-5-207, MCA, felony criminal endangerment.

I represent the final judgment improperly excluded credit for time spent incarcerated and also excluded previously awarded street-time credit. I further represent the Court overstepped its statutory authority by imposing said sentence because it is longer then the intended original sentence.

I seek to have applied to this conviction, the street-time awarded as part of the suspended sentence and the legislatively mandated incarceration time I served directly related to this conviction thereby, freeing me from my physical restraint.

#### EXPLANATION OF APPENDIX

Enclosed are only the pertinent pages of the judgments cited herein and done so for brevity and my lack of financial resources to make the numerous copies and postage to send such. The documents are lettered in the top right corner in blue ink.

#### CHRONOLOGICAL CHAIN OF EVENTS AND LEGAL DISCUSSION

I was arrested on January 6<sup>th</sup> 2004 for felony criminal endangerment and misdemeanors and remained incarcerated in lieu of a \$50,000 bond until release on March 11<sup>th</sup> 2004, see Appendix at top of A2. Days incarcerated for this period: 66 – Awarded in Appendix B judgment filed July 16<sup>th</sup> 2004, page 6, line 10.

From March 12<sup>th</sup> 2004 through March 15<sup>th</sup> 2004, I was under conditions of release therefore serving street-time. Days of street-time in this period: 4 – Awarded in part in Appendix C judgment filed August 31<sup>st</sup> 2005, page 5, line 10.

On March 16<sup>th</sup> 2004, I was returned to jail following a felony arrest warrant for violating the terms of release for the then pending criminal endangerment charge. After said arrest, I was charged with items relating to possession of drug paraphernalia. The original \$50,000 bond for criminal endangerment was re-imposed along with a bond for drug paraphernalia. I remained incarcerated until May 13<sup>th</sup> 2004 when sentenced to three-years deferred for criminal endangerment under the supervision of Missoula's Probation and Parole. On that same date, I was also sentenced for the misdemeanor drug paraphernalia and released, see Appendix at bottom of A1. Days incarcerated for this period: 59 – Never acknowledged in any judgment.

It is very important to recognize my arrest was for violating the conditions of release for criminal endangerment. It was subsequent that I was charged with separate misdemeanors. Regardless of the latter charges, I was being returned to jail for violating conditions of release on the felony criminal endangerment therefore, my incarceration

was directly related to the felony criminal endangerment and only incidentally related to the paraphernalia charges. With this finding, the 59 days served incarcerated shall be credited to the criminal endangerment conviction pursuant to §46-18-403(1). Also see State v. Henderson, 2008 MT 230, ¶19, 344 Mont. 371, 188 P.3d 1011; and State v. Erickson, 2005 MT 376, ¶24, 329 Mont. 192, 124 P.3d 119; and State v. Kime, 2002 MT 38, ¶16, 308 Mont. 341, 43 P.3d 290.

From May 14<sup>th</sup> 2004 through January 22<sup>nd</sup> 2005, I was under terms of Missoula's Probation and Parole and again serving street-time under my criminal endangerment conviction. Days of street-time in this period: 254 – Awarded in part in Appendix C judgment filed August 31<sup>st</sup> 2005, page 5, line 10, and again page 6, line 6-7.

On January 23<sup>rd</sup> 2005, I was arrested for misdemeanor D.U.I. and posted bond the next day. This arrest is mentioned only because the street-time, discussed later, was awarded up to this point.

On April 11<sup>th</sup> 2005, I was arrested for a criminal endangerment probation violation and posted bond April 15<sup>th</sup> 2005, see Appendix A1. Days incarcerated in this period: 5 – Never acknowledged in any judgment.

On May 25<sup>th</sup> 2005, I was arrested for unrelated charges and remained incarcerated in lieu of \$150,000 bond. On August 11<sup>th</sup> 2005, judgment was pronounced pursuant to the plea agreement in Appendix D.

Unfortunately my placement at Alpha House Pre-Release has barred meaningful access to legal resources but the following argument will focus on double jeopardy.

#### DOUBLE JEOPARDY

The sentence agreed upon and received in the foregoing unrelated charges was dependent on my agreement to the State's recommendation of a two-year increase in the felony criminal endangerment conviction that a petition to revoke was pending, see Appendix D, page 2, line 4-7. Not only did I agree to the judgment of all time suspended except time spent incarcerated – 79 days – for the unrelated charges, I also agreed to a two-year increase in my original sentence for criminal endangerment..

Double Jeopardy provisions enshrined in our State and Federal Constitutions bar multiple punishments from the same criminal acts. The wording located in Appendix D,

page 2, line 4-7 make it clear the State would get a conviction of six months for Count I and one-year for Count II to run concurrent with each other and to the criminal endangerment sentence and because of this unrelated misdemeanor conviction, the State would further pursue a two-year enhancement in my criminal endangerment conviction making the three-year deferred into a five-year suspended commitment to the Department of Corrections. Multiple punishments for the same conviction.

This Court has established in several decided cases, an illegal sentence cannot stand even if everyone agreed to it. Therefore, the plea agreement is invalid along with the multiple punishments that were imposed especially, the two-year increase in DC-04-083, felony criminal endangerment. I will now return to the issue of credit for street-time and incarceration time.

On August 11<sup>th</sup> 2005, I received judgment in the unrelated charges and additionally, my three-year deferred sentence was revoked and replaced with a suspended five-year commitment to the Department of Corrections, see Appendix C, page 2, line 8-14.

That newly imposed five-year sentence became the “original” sentence for the criminal endangerment conviction and was reduced with award of all street-time through January 23<sup>rd</sup> 2005. Days of street-time between January 6<sup>th</sup> 2004 – the day criminal endangerment was alleged – through January 23<sup>rd</sup> 2005 including the four days of release in March 2004: 258 – Awarded in Appendix C judgment filed August 31<sup>st</sup> 2005, page 5, line 10 and again page 6, line 6-7.

In addition to the awarded street-time but excluded in the judgment, all incarcerated time spent directly related to the criminal endangerment conviction. §46-18-403(1) states that:

A person incarcerated on a bailable offense against whom a judgment of imprisonment is rendered must be allowed credit for each day of incarceration prior to or after conviction. . .

Therefore, 125 days of pre-conviction should have been applied. Additionally, §46-18-203 (7)(b) states in pertinent part:

Credit must be allowed for time served in a detention center or home arrest time already served.

Therefore, the five days served in April 2005 should have been included but was not. This brings to a grand total of 130 days of incarceration time that is directly related to the felony criminal endangerment change,

The District Court was gracious to award credit for street-time however, by refusing/neglecting to also award the legislatively mandated credit for incarceration time, the sentence is illegal:

The mere fact that the District Court exceeded its statutory authority in imposing a criminal sentence, however, does not render the sentence void *ab initio*. A sentence in excess of one prescribed by law is not void *ab initio* because of the excess, but is good insofar as the power of the court extends and is invalid only as to the excess. Charles v. Commonwealth, (Va. 2005), 270 Va.14, 20, 613 S.E.2d 432, 435. Only the portion of the sentence beyond the district court's statutory authority is illegal.

DeShields v. State, 2006 MT 58, ¶11, 331 Mont. 329, 132 P.3d 540. It is appropriate then to amend the judgment filed August 31<sup>st</sup> 2005 to include 125 days of pre-conviction time and five days of incarceration directly related to this conviction making a total of 130 days that would combine with the 258 days of street-time already awarded bringing a grand total of 388 days of credit to be applied against the five-year suspended D.O.C. commitment.

In other words, the newly imposed five-year suspended D.O.C. sentence can be best shown in this algebraic formula:

$$1825 \text{ days minus } 388 \text{ days credit} = 1437 \text{ impossible days}$$

It is my position, and will be argued later, that the 388 days of credit is an inextricable part of the newly imposed, original sentence for criminal endangerment. The only way to change this credit once imposed was with a completely new sentence and even then, §46-18-203(7)(b) and §46-18-403(1) required credit for incarceration time.

On October 15th 2005, I was arrested for D.U.I. and plead guilty to such on November 7th 2005 with credit for time served, see Appendix E. On November 9th 2005, I posted bond for the felony probation violation. None of these days will be considered.

On November 16th 2005, I was arrested for alcohol in violation of conditions of release for criminal endangerment and remained incarcerated until release on January 4th

2006 on numerous stringent conditions including daily breath analysis, see Appendix A1. Days incarcerated for this period: 50 - Awarded in part in Appendix F judgment filed May 19th 2006, page 5, line 25-26.

On February 15th 2006, I was returned to jail for alcohol and remained incarcerated. The 'five-year' suspended D.O.C. sentence was revoked on April 13th 2006. Days incarcerated for this period: 58 - Awarded in part in Appendix F judgment filed May 19th 2006, page 5 line 25-26.

Here is the crux of this argument: Did the District Court exceed its authority by refusing to grant the previously awarded credit when the suspension was revoked? My position is yes.

Reviewing the plain language of §46-18-203(7)(a)(iii):  
revoke the suspension of sentence and require the offender to serve either the sentence imposed or any sentence that could have been imposed that does not include a longer imprisonment or commitment term than the original sentence. This should be interpreted as allowing the Court to change, at the most, the arraignment of who the offender is committed to and for how long. We'll use my 'five-year' sentence as an example.

When the suspension was removed, the Court could only impose say a three-year D.O.C. with two-years suspended; or one-year of pre-release with four-years suspended; or five-years M.S.P.; or. . . Regardless of the combination, the imposition had to acknowledge the original credit for time awarded since the suspension was being revoked, not an entirely new sentence imposed.

Furthermore, if the credit for time awarded was not acknowledged, the sentence would be a longer imprisonment/commitment than the original sentence of 'five-years' that was reduced with the time awarded, and would therefore be against statute. To further illustrate, State v. White, 2008 MT 464, ¶23, 348 Mont. 196, 199 P.3d 274 held that even a simple increase in sentence conditions was an increase in the sentence:

It is self-evident that if "the sentence imposed" was a ten-year suspended sentence subject to conditions A, B, and C, than a ten-year suspended sentence subject to Conditions A, B, C *plus* Conditions D, E, and F is neither "the sentence imposed" nor a "lesser" sentence. [Emphasis Original].

White's analysis involves a slightly different statute and situation however, on a fundamental level it is identical to my case because the original sentence imposed was 'five-years' minus street and incarceration time which resulted in an actual sentence of roughly three-years and eleven-months.

When the suspension was revoked, so was the previously awarded time which increased the length of imprisonment by a year and one month - a hefty increase of imprisonment and impermissible according to the plain language of §46-18-203(7)(a)(iii).

There is law which governs street and incarceration time but does it apply to time already awarded in the original 'five-year' sentence? Let's turn to §46-18-203(7)(b) for the answer:

If a suspended or deferred sentence is revoked, the judge shall consider any elapsed time and either expressly allow all or part of the time as a credit against the sentence or reject all or part of the time as a credit. The judge shall state the reasons for the judge's determination in the order. Credit must be allowed for time served in a detention center or home arrest time already served.

Using the plain language doctrine, when a suspended sentence is revoked, "any elapsed time" means elapsed since the suspension was imposed. Since my street and incarceration time occurred before the newly imposed 'five-year' suspended sentence and became an inextricable part of that sentence, it was outside the range of consideration and/or modification.

Found in Appendix F, page 5, line 21-26, is the Court's denial of all but the erroneous 148 days in jail. The statement at line 24, "elapsed time between the date of his conviction and the date of this Order," is the point the Court exceeded its authority by considering time before the new, original 'five-year' judgment. Reading §46-18-203(7)(b),

If a suspended or deferred sentence is revoked, the judge shall consider any elapsed time. . .

can be restated as, "the judge shall consider any elapsed time since the suspended sentence was imposed." It makes no sense for this statute to be interpreted as allowing the judge to re-consider time prior to the imposed 'five-year' sentence. If that was the intent, the read would be, "any elapsed time since the date of conviction." This is unnecessary

since legislation delineated the period to be considered in the first eight words, "If a suspended or deferred sentence is revoked. . ."

### CONCLUSION

As stated earlier, when my street-time was taken off the suspended 'five-year' sentence, it resulted in a "longer imprisonment or commitment term than the original sentence;" which is specifically restricted by §46-18-203(7)(a)(iii). When the 'five-year' suspended sentence was issued, it became the new "original" sentence and nullified the three-year deferred sentence. The 'five-year' sentence minus street-time awarded and incarceration time served is set in stone, Thereafter the Court is only authorized to revoke the suspension of the time imposed, change conditions, or modify the department who will supervise. Nothing in statute allows the Court to increase the length of a suspended sentence. Indeed, the Court is specifically restricted from imposing a sentence that is a "longer imprisonment or commitment term than the original sentence." See §46-18-203(7)(a)(iii).

The Court considered my street-time and awarded such as an integral part of the 'five-year' sentence. To go back and re-consider this time then simply take it away was not allowed by law and would be fundamentally unfair since it was considered and approved. Regardless of my later violations, the Court found it appropriate to award the street-time up to the January 23rd 2005 violation when the Court imposed a new, "original" five-year suspended sentence.

### RELIEF REQUESTED

WHEREFORE, petitioner respectfully petitions this Honorable Court to nullify the judgment(s) filed August 31st 2005 on the bases of double jeopardy; and/or

WHEREFORE, petitioner respectfully petitions this Honorable Court to apply the previously awarded street-time totaling 258 days beginning March 12<sup>th</sup> 2004 through January 22<sup>nd</sup> 2005, reducing the five-year commitment to D.O.C.; and

WHEREFORE, petitioner respectfully petitions this Honorable Court to apply the legislatively mandated incarceration time totaling 130 days served beginning January 6<sup>th</sup> 2004 through April 15<sup>th</sup> 2005, further reducing the five-year commitment to D.O.C.; and



WHEREFORE, petitioner respectfully petitions this Honorable Court to apply the 108 days of incarceration served between November 16<sup>th</sup> 2005 through April 13<sup>th</sup> 2006, bringing a grand total of 496 days to be applied against the 'five-year' commitment to D.O.C.; and

WHEREFORE, petitioner respectfully petitions this Honorable Court to award any other relief which is appropriate.

Respectfully Submitted,

*Robert J. Thomas*  
ROBERT JAMES THOMAS

STATE OF MONTANA )

)ss:

COUNTY OF YELLOWSTONE )

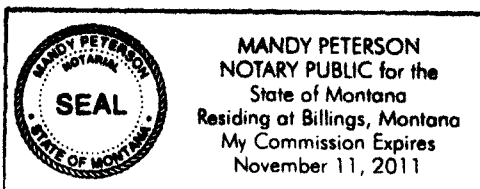
I, Robert James Thomas, pro se petitioner do declare under penalty of perjury and false swearing that I have read the foregoing PETITION FOR HABEAS CORPUS and that the information contained and attached is true, accurate, and to the best of my knowledge.

*Robert J. Thomas 2/19/2010*

ROBERT J. THOMAS

*Mandy Peterson*

NOTARY FOR MONTANA STATE



Name: \_\_\_\_\_

Residing at: \_\_\_\_\_

Commission Expires: \_\_\_\_\_

CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing,  
Verified Petition For Writ Of Habeas Corpus,  
by depositing said copies into the U.S. mail, postage prepaid, addressed to the  
following:

Supreme Court of Montana  
P.O. Box 203003  
Helena, MT 59620

Montana's Attorney General  
P.O. Box 201461  
Helena, MT 59620

RESPONDENT FOR:

Mr. Mike FERNITEG

Mr. Dave Armstrong

DATED this 19<sup>th</sup> day of February, 2010.

Robert J. Thomas  
Signature